Ghazalee bin Kassim & Ors v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J 05–7 OF 2007, J 05-8 OF 2007 AND J 05–9 OF 2007
LOW HOP BING, RAUS SHARIF AND ZAINUN ALI JJCA
22 MAY 2008

Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — 'Cannabis (Indian Hemp)' deleted from Part III of the First Schedule by Dangerous Drugs (Amendment of First Schedule) Order 1996 — 'Cannabis' expressly retained in both Part I and Part II — Whether any offence committed for trafficking in cannabis

Criminal Procedure — Judgment — Delay — Reserved judgment — Delay of four years and five months — Whether appellants' rights to a fair trial being compromised

Evidence — Informer — Failure to call informer as witness — Whether fatal

The appellants were found guilty and convicted by the trial court on a charge of trafficking in cannabis, punishable under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). Learned counsel for the appellants contended that after having reserved judgment, the trial court's delay of four years and five months in deciding that there was a prima facie case had rendered the convictions and sentences unsafe, by reason of the trial judge's loss of audio-visual advantage, omission of crucial issues relevant to the case, and compromise of the appellants' rights to a fair trial. The prosecution responded that the delay did not automatically vitiated the convictions and sentences. The defence contended that the prosecution's failure, to call Ah Meng (an informer) or to offer him to the defence for cross-examination, had prejudiced the appellants and was fatal. The prosecution in reply contended that apart from introducing the third appellant, Ah Meng did not play any active role and an attempt to trace Ah Meng had proved unsuccessful, thus, the presumption under s 114(g) of the Evidence Act 1950 ('the Act') inapplicable.

The trial court found that it was the defence who sought to cast Ah Meng as an agent provocateur, but there was no evidence that Ah Meng was other than an informer and there was unchallenged evidence that Ah Meng was not

available after the attempt to trace him had turned futile. The defence also referred to the Dangerous Drugs (Amendment of First Schedule) Order 1996 ('the amendment order') in which the Minister of Health acting under s 45A(c) had deleted, inter alia, 'cannabis (Indian Hemp)' from Part III of the First Schedule with effect from 12 April 1996, and contended that, as a result, the appellants, who were arrested on 29 April 2000 for trafficking in cannabis, had committed no offence on the basis of *Public Prosecutor v Md Alim bin Samad* [1998] 1 MLJ 260 HC (Md Alim bin Samad), and *Public Prosecutor v Roselang Abdul Rahman (Johor Bahru High Court MT1-13* 1999) (unreported) (*Roselang*). The prosecution, in supporting the decision of the trial court, the prosecution adhered to the chemist's evidence that the drug in question was cannabis as defined in s 2 of the DDA, and relied on *Public Prosecutor v Shee Chin Wah* [1998] 5 MLJ 429 HC.

Held, dismissing the appeal:

(1) On the facts, the trial court's maximum evaluation and appreciation of prosecution evidence signified an embarkation on a meticulous exercise in the consideration process before arriving at the finding that there was a prima facie case for the appellants to answer. Further, the court was unable to come to a finding that the learned trial judge had occasioned any loss of audio-visual advantage, nor was there any omission on his part to consider crucial issues relevant to the case; less so any compromise of the appellants' rights to a fair trial. Thus there was no merit in the defence contention (see paras 26–28).

(2) The trial court had arrived at the correct finding that Ah Meng was a mere informer and not an agent provocateur. The trial court had also carefully considered the defence contention in this regard. The court was unable to find any non-direction on the part of the trial court and so there was no miscarriage of justice at the trial (see para 40).

(3) The unchallenged evidence adduced in the trial court revealed that the prosecution had made an attempt to bring Ah Meng to court as a witness but it was a fruitless exercise. The prosecution had merely failed to obtain evidence. There was no withholding or suppression of evidence. Hence, no adverse inference could be invoked against the prosecution under s 114(g) of the Act (see para 42).

(4) The chemist's evidence, that the drug in question was cannabis within the meaning of s 2, was given as an expert under s 45 of the Act ie being a person skilled in science and was a relevant fact. On the facts, this evidence had indeed been correctly considered and accepted by the trial court (see para 54).

(5) The chemist evidence that the drug in question could be described as 'Cannabis (Indian Hemp)' or that Indian Hemp is a synonym of cannabis had in effect negated the defence contention that trafficking in Indian Hemp was not an offence under s 39B(1)(a). The effect of the chemist's evidence was that cannabis and Indian Hemp were terms which might be used interchangeably, so that trafficking in cannabis or its synonym 'Indian Hemp' came squarely within the ambit of the term 'cannabis' expressly retained in both Part I and Part II of the First Schedule and was dangerous drug under s 2. The fact that Indian Hemp was cannabis or was synonymous with cannabis and vice versa had neither been doubted nor disputed by the defence at all (see para 57).

(6) In the circumstances, the defence contention raised and accepted in *Md Alim Samad*, and *Roselang* demonstrated an inherent oversight in that there was an error in failing to consider both Part I and Part II, wherein the existence of cannabis remained unaffected notwithstanding the amendment order. As cannabis had been expressly listed in both Part I and Part II and was dangerous drug as defined in s 2, the act of trafficking in cannabis which was synonymous with Indian Hemp clearly constituted an offence under s 39B(1)(a) with which the appellants had been charged (see paras 58–59).

[Bahasa Malaysia summary

Perayu-perayu telah didapati bersalah dan disabitkan oleh mahkamah perbicaraan atas pertuduhan mengedar kanabis, dan boleh dihukum di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Peguamcara perayu-perayu menghujahkan bahawa selepas penghakiman yang ditangguhkan, kelewatan mahkamah perbicaraan selama empat tahun dan lima bulan dalam memutuskan sama ada terdapat satu kes prima facie telah menjadikan sabitan dan hukuman tersebut tidak selamat, oleh kerana kehilangan manfaat pandang dengar, peninggalan isu-isu yang penting yang relevan kepada kes tersebut, dan mengkompromi hak perayu-perayu kepada satu perbicaraan yang adil. Pihak pendakwaan menjawab bahawa kelewatan tidak secara automatik menjadikan sabitan dan hukuman tidak sah. Pembelaan berhujah bahawa kegagalan pendakwaan, untuk memanggil Ah Meng (seorang pemberi maklumat) atau menawarkannya kepada pembelaan untuk pemeriksaan balas, telah memprejudiskan perayu-perayu dan ini adalah mudarat. Pihak pendakwaan di dalam menjawab berhujah bahawa selain daripada memperkenalkan perayu ketiga, Ah Meng tidak memainkan peranan yang aktif dan percubaan untuk mencari Ah Meng telah dibuktikan tidak berjaya, maka, anggapan di bawah s 114(g) Akta Keterangan 1950 ('Akta tersebut') tidak beraplikasi.

Mahkamah perbicaraan mendapati bahawa ia adalah pihak pembelaan yang cuba menjadikan Ah Meng sebagai 'agent provocateur', tetapi tiada bukti

bahawa Ah Meng adalah selain daripada seorang pemberi maklumat dan terdapat keterangan yang tidak dicabar bahawa Ah Meng tidak dapat dijumpai selepas percubaan untuk mengesannya gagal. Pihak pembelaan juga merujuk kepada Peraturan Dadah Berbahaya (Pindaan kepada Jadual Pertama) 1996 ('peraturan pindaan') di mana Menteri Kesihatan bertindak di bawah s 45A(c) telah memansuhkan, antara lain, 'cannabis (Indian Hemp)' daripada Bahagian III Jadual Pertama bermula dari 12 April 1996, dan menghujahkan bahawa, akibat dari itu, perayu-perayu yang ditahan pada 29 April 2000 untuk mengedar kanabis, tidak melakukan sebarang kesalahan atas dasar *Public Prosecutor v Md Alim bin Samad* [1998] 1 MLJ 260 HC (*Md Alim bin Samad*), dan *Public Prosecutor v Roselang Abdul Rahman (Johor Bahru High Court MT1-13* 1999) (tidak dilaporkan) (*Roselang*).Pihak pendakwaan di dalam menyokong keputusan mahkamah perbicaraan, mengikut keterangan ahli kimia bahawa dadah tersebut adalah kanabis seperti yang ditafsirkan di dalam s 2 ADB, dan bergantung kepada kes *Public Prosecutor v Shee Chin Wah* [1998] 5 MLJ 429 HC.

Diputuskan, menolak rayuan:

(1) Sebenarnya, penilaian maksimum dan kesedaran berhubung keterangan pendakwaraya oleh mahkamah perbicaraan menunjukkan penggunaan penelitian yang cermat dalam proses penimbangan sebelum membuat penemuan bahawa terdapat satu kes prima facie untuk perayu-perayu menjawab. Selanjutnya, mahkamah tidak dapat membuat satu penemuan bahawa hakim perbicaraan yang bijaksana telah kehilangan apa-apa manfaat pandang dengar ataupun terdapat apa-apa peninggalan di pihak beliau untuk mempertimbangkani isu-isu penting yang relevan kepada kes; mahupun mengkompromi hak perayu-perayu kepada satu perbicaraan yang adil (lihat perenggan 26–28).

(2) Mahkamah perbicaraan telah membuat penemuan yang betul bahawa Ah Meng hanyalah seorang pemberi maklumat dan bukan agent provocateur. Mahkamah perbicaraan telah juga mempertimbangkan dengan teliti penegasan pembelaan dalam hal ini. Mahkamah ini tidak dapat menemui sebarang ketiadaan arah di pihak mahkamah perbicaraan dan dengan itu tiada ketidakadilan yang berlaku di perbicaraan tersebut (lihat perenggan 40).

(3) Keterangan yang tidak dicabar yang dikemukakan di mahkamah perbicaraan menunjukkan bahawa pihak pendakwaan telah membuat percubaan untuk membawa Ah Meng ke mahkamah sebagai seorang saksi tetapi gagal. Pihak pendakwaan hanya gagal memperolehi keterangan. Tiada penyekatan atau penahanan keterangan. Dengan itu, tiada inferens menentang yang dapat dibangkitkan terhadap pihak pendakwaan di bawah s 114(g) Akta tersebut (lihat perenggan 42).

(4) Mahkamah perbicaraan mesti mempertimbangkan keterangan ahli kimia bahawa dadah yang dipersoalkan itu adalah kanabis dalam maksud s 2, telah diberikan sebagai seorang pakar di bawah s 45 Akta tersebut iaitu orang yang pakar dalam bidang sains dan adalah satu fakta relevan. Atas fakta ia telahpun dipertimbangkan dengan betul dan diterima oleh mahkamah perbicaraan (lihat perenggan 54).

(5) Keterangan ahli kimia bahawa dadah yang dipersoalkan boleh digambarkan sebagai 'Cannabis (Indian Hemp)' atau Indian Hemp adalah sinonim kanabis telah sebenarnya menolak hujahan pembelaan bahawa mengedar Indian Hemp bukan kesalahan di bawah s 39B(1)(a). Kesan keterangan ahli kimia adalah bahawa kanabis dan Indian Hemp adalah terma-terma yang saling boleh tukar, dan pengedaran kanabis atau sinonimnya 'Indian Hemp' terjatuh dalam linkungan terma 'cannabis' yang dikekalkan di kedua-dua Bahagian I dan Bahagian II Jadual Pertama dan adalah dadah berbahaya di bawah s 2. Fakta bahawa Indian Hemp adalah kanabis atau merupakan sinonim kepada kanabis dan sebaliknya tidak diragui atau dipertikaikan oleh pihak pembelaan langsung (lihat perenggan 57).

(6) Dalam keadaan ini penegasan pembelaan yang dibangkitkan dan diterima di dalam kes *Md Alim Samad*, dan *Roselang* menunjukkan terdapat satu kesilapan dalam kegagalan mempertimbangkan kedua-dua Bahagian I dan Bahagian II, di mana kewujudan kanabis masih tidak terjejas walaupun terdapat peraturan pindaan tersebut. Oleh kerana kanabis telah secara langsung disenaraikan di kedua-dua Bahagian I dan Bahagian II dan adalah dadah berbahaya seperti yang dimaksudkan di dalam s 2, tindakan mengedar kanabis yang merupakan sinonim kepada sama dengan Indian Hemp jelas membentuk satu kesalahan di bawah s 39B(1)(a) yang mana perayu-perayu telah disabitkan (lihat perenggan 58– 59).]

Notes

For a case on failure to call informer as witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1836.

For cases on delay, see judgment in general, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2186–2247.

For cases on s 39B(1)(a) of the DDA 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (not folld)

Catholic Commission for Justice and Peace in Zimbabwe v Attorney General & Ors [1993] 2 LRC 279 (refd)

Cheak Yoke Thong v PP [1984] 2 MLJ 119 (refd)

D Bhuvan Mohan Patnaik & Ors v State of Andhra Pradesh & Ors [1975] 2 SCR 24 (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507 (not folld)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (refd)
Jago v District Court of New South Wales (1989) 63 ALR 644 (refd)
Kok Wah Kuan v PP [2007] 5 MLJ 174 (refd)
Hiew Min Yong v PP [2001] 5 MLJ 1 (refd)
Monie v Commonwealth of Australia [2005] 63 NSWLR 729 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Pang Chee Meng v PP [1982] 1 MLJ 137 (not folld)
PP v Koh Wah Kuan [2008] 1 MLJ 1 (refd)
PP v Md Alim bin Samad [1998] 1 MLJ 260 (overd)
PP v Roselang Abdul Rahman (Johor Bahru High Court MT1–13 of 1999) (unreported) (overd)
PP v Shee Chin Wah [1998] 5 MLJ 429 (folld)
Pratt & Anor v Attorney General for Jamaica & Anor [1993] 4 All ER 769 (refd)
R v Comerford [1998] 1 WLR 191 (refd)
R v Oliva [1965] 3 All ER 116 (refd)
R v Russell-Jones [1995] 3 All ER 239 (refd)
Ramanathan Chelliah v PP [2005] 1 CLJ 858 (refd)
Riley v Attorney General of Jamaica [1982] 3 All ER 469 (refd)
Sher Singh & Ors v The State of Punjab [1983] 2 SCR 582 (refd)
Sun Kam Heng v PP [1992] 2 MLJ 826 (refd)
TN Nathan v PP [1978] 1 MLJ 134 (refd)
TV Vatheeswaran v State of Tamil Nadu [1983] 2 SCR 348 (refd)
Tan Boon Kean v PP [1995] 4 CLJ 456 (refd)
Tan Hun Wah v PP and another appeal [1994] 1 MLJ 382 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)
Teoh Hoe Chye v PP and another appeal [1987] 1 MLJ 220 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)
Voon Chin Fatt v PP [1948–1949] MLJ Supp 131 (refd)

Legislation referred to

Child Act 2001 s 97(2)
Constitution of Zimbabwe s 15(1)
Dangerous Drugs Act 1952 ss 2, 37(da), 39B(1), 39B(1)(a),45 A(c), First Schedule Part I–III
Dangerous Drugs (Amendment of First Schedule) Order 1996
Evidence Act 1950 ss 27, 45, 114(g)
Federal Constitution art 135(2)
Jamaican Constitution s 17(1)

Appeal from: Criminal Trial No 45–21 of 2001 (High Court, Johor Bahru)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Nurulhuda Nuraini binti Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEALS

[1] The three related appeals for hearing and determination herein are:

Appeal No	Appellant
1. J-05-7-2007	Ghazalee bin Kassim (the first appellant)
2. J-05-8-2007	Mohamed Junaidi bin Hussin (second appellant)
3. J-05-9-2007	Mohd Salleh bin Yunos (the third appellant)

[2] All the appellants were found guilty and convicted by the Johor Bahru High Court ('the trial court') on a charge of trafficking in 50,650g of cannabis, punishable under s 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death. Unless otherwise stated, a reference to a section hereinafter is a reference to that section in the Dangerous Drugs Act 1952.

FACTS OF THE CASE

[3] Between 24 and 29 April 2000, ASP Zulkifli bin Ali (PW4), a narcotics officer, received information from his informer, one Ah Meng, concerning the drug trafficking activities of a male Malay named Zali.

[4] In planning to nab the trafficker, PW4 sought assistance, inter alia, from Cpl Ramli b Saad (PW8) and D/Cpl Mohd Hirbin Othman (PW9), both of Bukit Aman police headquarters, to act as undercover agents. PW8 and PW9 were provided with a Proton Wira car bearing registration No JDD 5140 ('car No JDD 5140').

[5] PW4 held a briefing on 26 April 2000 and divided his men into four groups, viz:

(1) Group 1, consisting of PW8 and PW9;

(2) Groups 2 and 3, led by Chief Inspector Charun (PW5) and Insp Zamri bin Rasab (PW11) respectively; and

(3) Group 4, in the person of D/Cpl Chew Kooi Hwa (PW10) who acted as an undercover agent cum buyer of the cannabis and was provided with RM70,000.

[6] PW4 booked two rooms viz 213 and 228 in the Johor Bahru Lion Hotel for the purpose of the drug transaction.

[7] On 29 April 2000 at about 10am, upon receiving additional information from Ah Meng, PW4 directed PW8 and PW9 to go to the compound of the Johor Bahru General Post Office ('the post office') followed by PW5 and his men.

[8] In the compound of the post office, the first appellant approached PW8 and offered to take PW8 to the place where cannabis was kept. The first appellant then got into car No JDD 5140 in which PW9 was at the wheel.

[9] The first appellant showed the direction to the Johor Bahru Merlin Inn, while second appellant followed in a Kancil car bearing registration No JFN 1042 ('car No JFN 1042'). PW5 and his men who were near the post office also followed car No JDD 5140 and car No JFN 1042.

[10] Upon reaching the basement car park of Merlin Inn, the first appellant directed PW9 to park car No JDD 5140 beside Proton Wira car bearing registration No WFJ 7045 ('car No WFJ 7045'). The first appellant then unlocked the boot of car No WFJ 7045. There were three bags in the boot. He unzipped one of the bags for both PW8 and PW9 to check, and then asked them to transfer the bags into car No JDD 5140.

[11] The first appellant then proceeded to the driver's seat of car No WFJ 7045 where he started the ignition and waited therein. PW8 checked the contents of the bags. Upon noticing that PW5 and his men had arrived at the car park, PW8 gave the pre-arranged signal for PW5 to effect the arrest. The first appellant was arrested while he was seated in the driver's seat.

[12] Meanwhile, PW5, through a walkie talkie, instructed his men to arrest the second appellant. The second appellant was arrested by D/Cpl Mohamad Yassin (PW6) when the former was running towards the lobby of Merlin Inn. PW5 then seized the three bags.

[13] D/Cpl Chew Kooi Hwa (PW10) was in room 213 of Lion Hotel at about 11.15am on 29 April 2000 when the third appellant came with Ah Meng who introduced the third appellant as 'Zali' to PW10. The third appellant, who counted the RM70,000, received two phone calls through his

A hand phone. In the second call, PW10 heard the third appellant's utterances in an angry tone: 'Dahkah belum? Kenapa lambat sangat?' ('Is it done? Why so late?').

B **[14]** After PW10 had handed over the RM70,000 to the third appellant, the latter tried to make more calls through his hand phone but could not get through. The third appellant then angrily threw the phone onto the bed.

[15] A short while later, PW11 knocked at the door of room 213 which C PW10 opened. PW11 then arrested the third appellant who was in the toilet. Together with Ah Meng, PW10 left the room.

[16] All the appellants' act of trafficking in cannabis has been established by direct evidence.

D

DELAY

[17] Learned counsel Mr Hisham Teh Poh Teik submitted for all the E appellants that after having reserved judgment, the trial court's delay of four years and five months in deciding that there was a prima facie case has rendered the convictions and sentences unsafe, by reason of the trial judge's loss of audio-visual advantage, omission of crucial issues relevant to the case, and compromise of the appellants' rights to a fair trial. He garnered support F from:

(1) *Tan Hun Wah v Public Prosecutor and another appeal* [1994] 1 MLJ 382 (SC);

(2) *Monie v Commonwealth of Australia* [2005] 63 NSWLR 729;

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(3) *Cheak Yoke Thong v Public Prosecutor* [1984] 2 MLJ 119 (FC);

(4) *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 (FC);

(5) *Jago v District Court of New South Wales* (1989) 63 ALR 644;

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(6) *Ross on Crime* (3rd Ed) p 1166;

(7) *R v Comerford* [1998] 1 WLR 191 (CA);

(8) *Pratt & Anor v Attorney General for Jamaica & Anor* [1993] 4 All ER 769 I (PC);

(9) *Riley v Attorney General of Jamaica* [1982] 3 All ER 469 (PC);

(10) *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General* [1993] 2 LRC 279 (SC);

(11) *D Bhuvan Mohan Patnaik & Ors v State of Andhra Pradesh & Ors* [1975] 2 SCR 24;

(12) *Sher Singh & Ors v The State of Punjab* [1983] 2 SCR 582;

(13) *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (CA);

(14) *Voon Chin Fatt v Public Prrosecutor* [1948 - 1949] MLJ Supp 131 (HC);

(15) *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134 (HC);

(16) *Hiew Min Yong v Public Prosecutor* [2001] 5 MLJ 1 (HC);

(17) *Ramanathan Chelliah v Public Prosecutor* [2005] 1 CLJ 858 (HC);

(18) *Teoh Hoe Chye v PP and another appeal* [1987] 1 MLJ 220 (SC);

(19) *Sun Kam Heng v Public Prosecutor* [1993] 1 CLJ 109 (SC); and

(20) *Kok Wah Kuan v Public Prosecutor* [2007] 5 MLJ 174 (CA).

[18] Learned deputy public prosecutor Ms Nurulhuda Nuraini binti Mohd Nor responded that the delay does not automatically vitiate the convictions and sentences.

[19] I am of the view that the aforesaid submissions give rise to the following question for determination:

> Where there is a lapse of four years and five months from the date the trial court has reserved judgment at the close of the prosecution's case to the date of finding a prima facie case, can the delay per se be construed as having rendered unsafe the convictions and sentences arrived at by the trial court after the close of the defence case?

[20] The proper perspective is reflected in the chronology of events in the trial court as follows:

DATE	PROCEEDINGS
10 April 2002	Trial commenced.
22 May 2002	Prosecution closed its case.
2 July 2002	Prosecution and defence concluded their submissions. Trial court reserved judgment.
18 December 2006	Trial court found prima facie case and called for defence. All the appellants gave their respective statement from the dock.
9 January 2007	All the appellants were convicted as charged and sentenced to death.
11 January 2007	All the appellants filed notice of appeal.

3 September 2007	Learned trial judge signed the grounds of judgment.

[21] The plethora of authorities cited for the defence covered a wide variety of issues, including those in which no delay was raised; and where delays were ventilated, the delays may be further categorised.

[22] To achieve brevity, I shall tabulate several unsupportive authorities which do not concern any form of delay, as follows:

Authority	Issue
(1) *Cheak Yoke Thong*	The Federal Court dealt with the recusal of the trial magistrate.
(2) *Goi Ching Ang*	The Federal Court considered s 27 of the Evidence Act 1950.
(3) *R v Comerford,* (referred to in *Ross on Crime*)	Jury protection was raised.
(4) *D Bhuvan Mohan Patnaik & Ors*	The petitioners' failure to obtain an order for the removal of armed police guard posted around the jail and the dismantle of live wire electrical mechanism fixed on top of the jail wall.
(5) *Tan Tek Seng*	A reasonable opportunity of being heard pursuant to art 135(2) of the Federal Constitution.
(6) *Teo Hoe Chye*	Whether there was a serious gap in the prosecution's case.
(7) *Sun Kam Heng*	The Supreme Court upheld the defence attack on the break in the chain of evidence.
(8) *Kok Wah Kuan*	The Court of Appeal decided on s 97(2) of the Child Act 2001. Incidentally, this decision has been overruled by the Federal Court in *PP v Koh Wah Kuan* [2008] 1 MLJ 1.

[23] The other authorities cited for the defence illustrate the following catagories of delay:

(1) *Prosecution's delay in bringing an indictment*. This has not been tested in our courts, but was raised in *Jago*. There, the High Court of Australia dismissed the defence application for permanent stay of prosecution, and insisted that there must be *actual prejudice* or *unfairness* and *not merely on 'presumptive prejudice'*, as permanent stay should be ordered only in an extreme case but not on the basis of delay alone;

(2) *Prolonged delay in carrying out the execution of death sentence*. To date, in Malaysia, this has not become the subject matter of judicial hearing and determination. It has nevertheless been raised in other jurisdictions;eg:

(a) In Jamaica and Zimbabwe, the accused were successful in persuading the Privy Council and the Supreme Court of Zimbabwe respectively to commute a death sentence to life imprisonment, on the ground that the accused has discharged the burden of proving that the prolonged delay amounted to inhuman and degrading punishment contrary to s 17(1) of the Jamaican Constitution, as in *Pratt & Anor*, after referring to *Riley*, and, contrary to s 15(1) of the Constitution of Zimbabwe as in *Catholic Commission for Justice and Peace in Zimbabwe*;

(b) However, in *Sher Singh & Ors*, the Supreme Court of India overruled an earlier decision in *TV Vatheeswaran v State of Tamil Nadu* [1983] 2 SCR 348 and held that a death sentence cannot be vacated merely because of a two-year delay in carrying out the execution thereof.

(3) *Delay in writing or supplying grounds of judgment after the accused has filed a notice of appeal*. Our courts have held that this category of delay per se cannot be construed as vitiating a conviction and sentence; it is necessary for an accused to discharge the burden of proving error or errors on the part of the court eg:

(a) Prejudice due to:

(i) an omission to state something in the grounds which might have been favourable to the accused, as in *Voon Chin Fatt*, where the conviction and sentence were quashed as a result of such omission; or

(ii) acting on the uncorroborated evidence of an accomplice in a corruption trial, as in *TN Nathan*, where the conviction and sentence were set aside;

(b) Failure to assess the credibility of witnesses and misdirection on the standard of proof, as in *Hiew Min Yong,*, where the conviction and sentence were quashed;

(c) Misdirection on the standard of proof (enunciated in *Tan Boon Kean v PP* [1995] 4 CLJ 456) as in *Ramanathan*, where the conviction and sentence were set aside; and

(d) Fatal omission to ask whether the defence had, on a balance of probabilities, rebutted the presumption of trafficking under s 37(da), as in *Tan Hun Wan*, where the conviction for drug trafficking under s 39B(1)(a) was quashed and substituted with a conviction for

A possession thereof. However, the Supreme Court stressed that not every form of delay should result in vitiating the whole proceedings.

(4) *Delay in delivering a reserved judgment* (or, in Latin, cav = curia advisari vult). In my view, only this specific category of delay carries a close
B connection with and is of direct relevance to the type of delay under consideration in the instant appeal.

[24] By way of elaboration, in *Monie*, which was referred to in *Ross on Crime,* p 404 para 4.1150, the trial judge had reserved judgment and taken
C 18 months to deliver it after many false starts. Hunt AJA held, inter alia, that delay between taking evidence and the delivery of judgment does not, in itself, justify upholding an appeal against the judgment given, as error must still be established on the part of the trial judge.

D **[25]** In Malaysia, the above question for determination is arguably the first of its kind to be tested in our courts.

[26] Upon a proper perusal of the appeal record, it needs to be noted that
E the learned trial judge's grounds of judgment leading to the finding of a prima facie case cover a total of 63 pages viz from pp 124 to 187, and embrace a maximum evaluation and appreciation of the evidence adduced right up to the close of the prosecution's case. There is also a detailed discussion on the opening statement, the chemist's testimony and analysis, the law of drug
F trafficking, the burden and standard of proof, the defence contention as to whether the exhibits in question were cannabis as defined in s 2, whether it was an offence under s 39B(1)(a), and the various roles undertaken by the appellants in the entire episode as revealed in the evidence of prosecution witnesses. In reality, the trial court's maximum evaluation and appreciation of
G prosecution evidence signifies an embarkation on a meticulous exercise in the consideration process before arriving at the finding that there was a prima facie case for the appellants to answer.

[27] Further, I am unable to come to a finding that the learned trial judge
H had occasioned any loss of audio-visual advantage, nor was there any omission on his part to consider crucial issues relevant to the case; less so any compromise of the appellants' rights to a fair trial.

[28] In the circumstances, I hold that there is no merit in the defence
I contention. The answer to the above question is in the negative.

FAILURE TO CALL AH MENG

[29] The defence advocated that the prosecution's failure, to call Ah Meng

or to offer him to the defence for cross-examination, has prejudiced the appellants and is fatal. Reference was made to:

(1) *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC);

(2) *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 (SC);

(3) *R v Russell-Jones* [1995] 3 All ER 239 (CA);

(4) *Pang Chee Meng v Public Prosecutor* [1982] 1 MLJ 137 (SC); and

(5) *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 (SC).

[30] In response, the prosecution argued that:

(1) apart from introducing the third appellant to PW10, Ah Meng did not play any active role; and

(2) an attempt to trace Ah Meng had proved unsuccessful, in which case there was no suppression of evidence, thereby rendering the presumption under s 114(g) of the Evidence Act 1950 inapplicable. Support was sought in:

   (1) *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC) and

   (2) *Ti Chuee Hiang*.

[31] The trial court found that:

(1) it was the defence seeking to cast Ah Meng as an agent provocateur, but there was no evidence that Ah Meng was other than an informer; and

(2) there was unchallenged evidence that Ah Meng was not available after the attempt to trace him had turned futile.

[32] Under this head, the question that arises for determination is:

Is the failure to call the informer fatal to the case for the prosecution?

[33] I would first analyse three defence authorities which apparently concern different issues.

[34] First, in *Abdullah Zawawi*, the accused was acquitted on appeal to the Supreme Court because the prosecution had fallen short of proving a prima facie case.

[35] Then, in *Pang Chee Meng*, the Supreme Court had allowed the accused's appeal against conviction and sentence under s 39B(1) because:

(1) The police evidence under s 27 of the Evidence Act 1950 was unsatisfactory and has created a lurking doubt on the thoroughness of police investigation;

A (2) The trial judge had erroneously directed himself on the principles to be applied in determining issues of fact and law; and had adopted a wrong approach in regard to the burden of proof and seemed to expect a higher standard of proof from the defence than that of creating a reasonable doubt; and

B (3) In the accused's cautioned statement, he stated that there were three others sharing the room from which the dangerous drug was found.

[36] The third authority is *Gooi Loo Seng*, where the accused, his girlfriend C and her friends could have access to the room occupied by the accused and his girlfriend. The contents of the search list told a materially different story from the evidence of the officer in charge. The trial judge did not view the entire evidence objectively, and so on appeal, the conviction and sentence were set aside.

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[37] Hence, with the utmost respect, I am of the view that *Abdullah Zawawi*, *Pang Chee Meng*, and *Gooi Loo Seng*, are unhelpful to the defence.

E **[38]** In *Ti Chuee Hiang*, a team of policemen had planned and organised a trap to arrest a drug dealer who was the accused there. A policeman posed as a heroin buyer. A meeting with the accused was arranged through the help of a police informer. Negotiations between the accused and the police for the sale of heroin, which ended as a concluded deal, was carried out. The accused F was arrested when he was delivering heroin to the police. To a charge of drug trafficking under s 39B(1)(a), the accused's defence that he was an innocent carrier was rejected by the trial judge. On appeal, the accused cited miscarriage of justice in that the prosecution had failed to either call as a witness, or at least make available to the defence for cross-examination, the G informer who had assumed the role of an agent provocateur. The Supreme Court speaking through Edgar Joseph Jr SCJ (as he then was) held, inter alia, that:

(1) in the informer's default, the prosecution had failed in its obligation to explain why they were unable to call him; and

H (2) although the defence had criticised the prosecution for failing to call the informer, the trial judge did not direct his attention to this point at all, and so there was a serious misdirection by way of non-direction occasioning a miscarriage of justice.

I *Ti Chuee Hiang,* made extensive reference to the judgment of Lord Parker CJ in *R v Oliva* [1965] 3 All ER 116 CCA, which was also applied in *Russell-Jones*. These two English Court of Criminal Appeal judgments had established seven rules of practice, one of which is that prosecutorial discretion to call any witness must be exercised in the interest of justice, so

as to promote a fair trial. It was also cautioned that what has been said of the rules of practice should not be regarded as a lexicon or rule book to cover all cases in which a prosecutor is called upon to exercise this discretion. There may be special situations; and in every case, the judgment to be made is primarily that of the prosecutor, and, in general, the court will only interfere with it if he has gone wrong in principle

[39] In the instant appeal, the trial court has arrived at the correct finding that Ah Meng was a mere informer and not an agent provocateur. The trial court has also carefully considered the defence contention in this regard. I am unable to find any non-direction on the part of the trial court and so there is no miscarriage of justice at the trial. In the circumstances, *Ti Chuee Hiang,* is readily distinguishable.

[40] In Malaysia, s 114(g) of the Evidence Act 1950 provides that the court may presume the existence of certain facts and that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. However, this adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence: per Mohamed Azmi SCJ (as he then was) in *Munusamy*.

[41] The unchallenged evidence adduced in the trial court reveals that the prosecution has made an attempt to bring Ah Meng to court as a witness but it was a fruitless exercise. The prosecution has merely failed to obtain evidence. There is no withholding or suppression of evidence. Hence, no adverse inference can be invoked against the prosecution under s 114(g).

[42] I therefore do not feel able to sustain the defence contention herein. The answer to the above question is in the negative.

CANNABIS

[43] Although PW3 (the chemist) did testify that the drug in question was cannabis as defined in s 2, he conceded under cross-examination that the drug could be described as 'cannabis (Indian Hemp)'. The defence referred to the Dangerous Drugs (Amendment of First Schedule) Order 1996 ('the amendment order') in which the Minister of Health acting under s 45A(c) had deleted, inter alia, 'cannabis (Indian Hemp)' from Part III of the First Schedule with effect from 12 April 1996, and submitted that, as a result, the appellants, who were arrested on 29 April 2000 for trafficking in cannabis, had committed no offence, on the basis of *Public Prosecutor v Md Alim bin Samad* [1998] 1 MLJ 260 HC, and *Public Prosecutor v Roselang Abdul Rahman* (Johor Bahru High Court MT1–13 –1999)(unreported).

[44] In supporting the decision of the trial court, the prosecution adhered to the chemist's evidence that the drug in question was cannabis as defined in s 2, and relied on *Public Prosecutor v Shee Chin Wah* [1998] 5 MLJ 429 HC

[45] The trial court held that:

(1) there is no doubt that the chemist had in mind cannabis as defined in s 2;

(2) the chemist's answer that 'Indian Hemp' is a synonym or common name for cannabis is precisely that only; and

(3) the material the chemist examined has the physical and chemical properties of cannabis as defined in s 2.

[46] Under this head, the question for determination is:

> Pursuant to the amendment order, is it still an offence under s 39B(1)(a) to traffick in cannabis when cannabis is synonymous with Indian Hemp?

[47] An analysis of the aforesaid authorities would be enlightening.

[48] In *Md Alim bin Samad*, the same question was canvassed. There, the chemist testified that the drug was cannabis as defined in s 2, but under cross-examination, he asserted that he could not deny that the drug was Indian Hemp. In acquitting the accused without calling for defence, Abdul Malik Ishak J (now JCA), at p 278 E to F held that:

(1) there is no ambiguity in the amendment order;

(2) there is only one construction and that construction favours the liberty of the accused;

(3) the sting of 'cannabis (Indian Hemp)' as a dangerous drug has been taken away; and

(4) the purported cannabis in which the accused was said to have trafficked was indeed Indian Hemp, and so the accused had not committed any offence known to law.

Md Alim bin Samad, was applied in *Roselang*, where the chemist confirmed in cross-examination that the drug in question can also be described as 'Cannabis (Indian Hemp)'. Syed Ahmad Helmy J shared the same sentiment as in *Md Alim Samad*.

[49] However, *Md Alim Samad*, and *Roselang*, were not followed in *Shee Chin Wah*, where the same issue required determination. The chemist said that:

(1) he would not describe the cannabis recovered from the accused within bracket as Indian Hemp; and

(2) Indian Hemp is one of the common names for cannabis in other countries; it means one and the same thing ie dangerous drug under s 2.

[50] Suriyadi J (now JCA) dismissed the defence submission and held that:

(1) the drug is cannabis under s 2 and the charge of trafficking in cannabis is valid; and

(2) the First Schedule consists of five Parts, wherein both Part I and Part II still retain the drug of cannabis.

[51] In view of the aforesaid diametrically opposite decisions of different branches of the High Court, two each on both sides of the divide, it is imperative for this court to determine which view is to be affirmed.

[52] In reverting to the instant appeal, it is to be noted that the chemist's evidence, that the drug in question is cannabis within the meaning of s 2, was given as an expert under s 45 of the Evidence Act 1950 ie being a person skilled in science and is a relevant fact which the trial court must consider. It has indeed been correctly considered and accepted by the trial court.

[53] The First Schedule was referred to in s 2 which in turn defines 'dangerous drug' as 'any drug or substance which is for the time being comprised in the First Schedule'. Section 2 also defines 'cannabis' as 'any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated'.

[54] 'Cannabis' is listed in both Part I and Part II of the First Schedule. Prior to the amendment order, Part III contained, inter alia, 'Cannabis (Indian Hemp)'. The amendment order in effect brings about the deletion of 'Cannabis (Indian Hemp)' in Part III. However, the amendment order keeps 'cannabis' intact as it is retained in both Part I and Part II and it is dangerous drug as defined in s 2.

[55] The chemist's evidence that the drug in question can be described as 'Cannabis (Indian Hemp)' or that Indian Hemp is a synonym of cannabis has in effect negated the defence contention that trafficking in Indian Hemp is not an offence under s 39B(1)(a). The effect of the chemist's evidence is that

A cannabis and Indian Hemp are terms which may be used interchangeably, so that trafficking in cannabis or its synonym 'Indian Hemp' comes squarely within the ambit of the term 'cannabis' expressly retained in both Part I and Part II and is dangerous drug under s 2. The fact that Indian Hemp is cannabis or is synonymous with cannabis and vice versa has neither been B doubted nor disputed by the defence at all. Indeed, it has been assiduously advanced for the defence by way of cross-examination of the chemist.

[56] With the utmost respect, the defence contention raised and accepted in *Md Alim Samad*, and *Roselang*, demonstrates an inherent oversight in that C there is an error in failing to consider both Part I and Part II, wherein the existence of cannabis remains unaffected notwithstanding the amendment order. As cannabis has been expressly listed in both Part I and Part II and is dangerous drug as defined in s 2, the act of trafficking in cannabis which is synonymous with Indian Hemp clearly constitutes an offence under D s 39B(1)(a) with which the appellants have been charged.

[57] In the circumstances, I am constrained to hold that *Md Alim Samad*, and *Roselang*, had been wrongly decided and are hereby overruled. The decisions in *Shee Chin Wah*, and in the trial court are correct. Hence, the E answer to the above question is in the affirmative.

CONCLUSION

F **[58]** On the foregoing grounds, the appellants' appeals are dismissed and the convictions and sentences of the trial court are hereby affirmed.

[59] My learned brother, Raus bin Sharif JCA and my learned sister Zainun binti Ali JCA have read this judgment in draft and have expressed their G agreement to make it the judgment of the court.

Appeals dismissed.

Reported by Sally Kee

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